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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

418

No. 418

EDWARD GIBBS,

Petitioner,

vs.

C. J. BURKE, Warden, Eastern State Penitentiary,
Philadelphia, Pennsylvania

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

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C. J. BURKE, WARDEN, EASTERN STATE PENITENTIARY, PHILADELPHIA, PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

BRIEF FOR THE PETITIONER

Opinion Below

The Supreme Court of Pennsylvania wrote no opinion. Its order denying petitioner's original petition for a writ of *habeas corpus* appears at R. 5.

Jurisdiction

The order of the Supreme Court of Pennsylvania denying petitioner's original petition for a writ of *habeas corpus*

(R. 5) was entered on July 6, 1948. The petition for a writ of certiorari was filed September 17, 1948, and granted November 15, 1948. The jurisdiction of this Court rests upon 28 U. S. C. (1948 revision) 1257(3) and 2101(c).

Constitutional Provisions Involved

The VI Amendment provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

Section 1 of the XIV Amendment provides in pertinent part:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *"

Article I, Section 9 of the Constitution of Pennsylvania provides in pertinent part:

> "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel * * *; he cannot be compelled to give evidence against himself, * * *"

Questions Presented

1. Whether petitioner was denied due process of law in the circumstances of the present case, by being forced to trial on a charge of felony without counsel, where the record shows that the trial judge was hostile, made erroneous rulings on evidence to petitioner's prejudice, and (in violation of state law) substantially destroyed petitioner's privilege against self-incrimination.

2. Whether, in any event and apart from the circumstances of the present case, application of the standards whereby the VI Amendment has been interpreted (in defiance of its narrow historical meaning) to require the appointment of counsel for all indigent prisoners charged with felony, requires a like interpretation of the XIV Amendment, particularly in the light of the latter Amendment's recently expanded scope.

Statement

After an unsuccessful attempt in February, 1948, to file a petition for a writ of *habeas corpus* with the Court of Common Pleas for Montgomery County, Pennsylvania (R. 4), petitioner commenced the present proceeding by filing a petition for a writ of *habeas corpus* in the Supreme Court of Pennsylvania (R. 2-3).

The petition set forth his incarceration in the Eastern State Penitentiary at Graterford (par. 1, R. 2), his arrest, arraignment, trial and conviction in Delaware County on a charge of larceny (pars. 2-5, R. 2-3), and his sentence to a term of from two and one-half to five years (par. 7, R. 3). The petition alleged (par. 6, R. 3) that petitioner "was denied counsel and through ignorance of law and fact was forced to act as his own counsel," that (par. 8, R. 3) he "was denied his Constitutional Rights as set forth in the Ten Original Amendments, Article VI," and that his detention was in consequence illegal (par. 8-A, R. 3); he prayed for the allowance of a writ of *habeas corpus*.

This petition, signed *pro se*, was filed May 24, 1948 (R. 1, 2). Not until almost a month later, on June 21, was a rule to show cause directed to the Warden Burke, the respondent here (R. 1).

The respondent's answer, filed June 24, simply set forth petitioner's sentence (R. 5) and attached a copy of the com-

mitment signed by the clerk (R. 6); both documents, however, erroneously recited that petitioner had pleaded guilty to the charge against him.[1]

Thereafter, on July 2, 1948, the District Attorney for Delaware County filed another answer (R. 6-9). This admitted the formal allegations and the fact of trial and sentence. As to par. 6, relative to the denial of counsel, the District Attorney denied that petitioner was denied counsel; "on the contrary, it is averred that he appeared and acted as his own counsel, conducted his defense, cross-examined the Commonwealth's witnesses and fully acted as his own counsel" (R. 7).

The District Attorney's answer next set out and summarized the proceedings preliminary to trial and the substance of the evidence against him at the trial (R. 7-8). With respect to the allegation as to denial of counsel, he stated (R. 7, 8):

> "* * * The transcript of the notes of testimony does not disclose that the relator demanded counsel nor requested that counsel be appointed to represent him. * * *
>
> "* * * The issues here presented by the relator were before your Honorable Court in the matter of *Comth. ex rel. Uveges*, v. *Ashe, Warden*, and the opinion therein rendered, *161 Pa. Superior Ct. P. 58*, clearly holds that the Petition for Writ of Habeas Corpus cannot be made a substitute for appeal; that he was not denied his constitutional rights under the averments as set forth in his petition for said writ.
>
> "It is also averred by way of answer that the relator's examination of witnesses and questions asked during the course of the trial fully disclosed his familiarity with legal process in the criminal courts."

---

[1] Other and more authoritative papers show that he pleaded not guilty; see R. 13, 14 (docket entries); R. 19 (transcript of trial); R. 3 (par. 3 of habeas corpus petition); R. 7 (par. 3 of answer).

The District Attorney referred to petitioner's criminal record (R. 8) and attached a transcript thereof (R. 9-11); this showed eight convictions (including two for drunkenness) and nine acquittals, discharges, and no true bills. The District Attorney also attached to his answer a transcript of docket entries in the case which resulted in petitioner's current conviction (R. 12, 14), a copy of the indictment (R. 12-13), a record of the proceedings before the Justice of the Peace (the committing magistrate) (R. 15-18), and a transcript of the testimony at petitioner's trial (R. 19-39).

Petitioner had been indicted for the larceny of a suitcase containing clothing, a watch, a camera, and a radio, aggregating $121.50 in value, the property of one James Blades (R. 12-13), and had pleaded Not Guilty (R. 13, 14, 19).[2]

The testimony against petitioner may be summarized as follows:

James Blades testified that he was a seaman, residing in Marcus Hook, Pennsylvania, and that he had seen the petitioner twice on July 17, 1948. When Blades came home at noon, his suitcase and clothing were missing; on complaining to his mother, he was told that the petitioner had been there. Later when he checked with a police officer he found the clothing in a store, and he found the petitioner in a tap room wearing the missing hat and watch; Blades' seaman's papers came out of petitioner's cell room "after the hearing." (R. 19-21.)

Petitioner cross-examined the prosecuting witness in an attempt to establish that they had been drinking beer together earlier that day, that "the stuff" had been taken pursuant to an understanding between them, and that

[2] A second count, charging petitioner with receiving stolen goods (R. 13), was withdrawn by the prosecution before the case was submitted to the jury (R. 32).

Blades had previously accused petitioner of a criminal charge of which petitioner had been acquitted (R. 21-22). The court sustained an objection to the latter line of questioning, as follows (R. 22):

> "The Defendant: Can I have permission to ask him about another time he accused me until it was proven otherwise?
>
> "The Court: It has nothing to do with this. If you are going into that, you might get something in here that you do not want in.
>
> "The Defendant: I will take my chances on that.
>
> "By the Defendant:
>
> "Q. Last fall, last year, didn't you wreck your own automobile and enter a complaint that I stole your car and wrecked it?
>
> "Mr. Johnson: Objected to.
>
> "The Court: Objection sustained. It has nothing to do with this case.
>
> "The Defendant: All right."

On redirect examination, Blades testified that he did not give petitioner the watch, and that he did not change hats with him (R. 23).

Mrs. Lafield, Blades' mother, testified that she saw the petitioner in her house on Thursday morning, July 17, 1948; that he went upstairs, and that he stood in front of Blades' door; and that in time she saw petitioner on the pavement. Later, when Blades came home, he said to his mother, "You are very smart this morning, you moved my radio and what did you do with my clothes?" Mrs. Lafield said she did not move the radio, and only put his slacks in the suitcase. Blades said the suitcase was gone, whereupon his mother "went upstairs and investigated and I said 'Eddy Gibbs has them because he has been in the house this morning.'" (R. 23-24.)

Cross-examination of Mrs. Lafield by the petitioner brought an admission that petitioner had asked for Jimmy, together with denials that petitioner had knocked, or that he had transmitted a message from Blades, or that there had been mention of petitioner's mother (R. 25).

Constable Fleming of the Marcus Hook Police testified that he arrested the petitioner after getting a call from the Chief of Police "to go up to Mrs. Lafield's to investigate a robbery that occurred there." Fleming went there, saw where the radio and the suitcase had been, and then went to Chester to check up on the pawnshops. At the third one, a place named James at 141 West Third Street, "Mr. Blades identified the articles taken." (R. 25-26.) The radio and the clothing were recovered in the pawnshop (R. 27). Fleming and Blades then found petitioner in a tap room, with his head on the table, "and the watch was exposed and he had on this same straw hat. Mr. Blades identified both of them." Petitioner was arrested, but "we didn't search him when he was put in because he was pretty well intoxicated." Later the wallet, covered by a pair of black kid gloves, was found in the cell which petitioner occupied alone. (R. 26-27.)

Questions of Fleming by the court elicited the following (R. 27):

"Q. Who operates the pawnshop?

"A. A fellow named James.

"Q. Did he describe a man like this defendant?

"A. Yes. The defendant told me he had taken the things to the pawnshop and pawned them.

"Q. Did he tell you how he got them?

"A. No, he did not. He told me on the way to Marcus Hook that James had given them to him.

"Q. James Blades?

"A. Yes."

On cross-examination by the petitioner, Fleming admitted that the wallet and gloves would be uncomfortable in a pocket while lying on an iron cot, and that it would be natural to take them out; but he insisted that the wallet was in the darkest corner of the cell with the gloves on top of it (R. 27-28). Petitioner also attempted to ascertain whether the witness asked the pawnshop keeper if two persons were there. Petitioner's efforts at cross-examination were as follows (R. 28):

"Q. Was it one party or two entered James'?

"A. One.

"Q. There wasn't two of us?

"A. No, there was not.

"Q. You didn't ask him concerning anyone else at all?

"A. Yes, I did.

"Q. That's funny. A fellow went in with me. We went in one place and he wouldn't take it because I told him it didn't belong to me——

"Mr. Johnson: He can't testify now. He is just supposed to ask questions.

"The Court: You can not testify yet. Later you can testify. Ask your questions now.

"The Defendant: This all leads up to it.

"The Court: You are only asking questions now. You may later take the stand and testify. If you do, you will open up to the district attorney the right to ask questions about certain things.

"The Defendant: Yes, sir.

"The Court: You may ask any questions you care to on cross-examination on what the district attorney has asked.

"The Defendant: That is all if he didn't ask the man about the two of us being in there."

James Silverstein, a secondhand dealer of 141 West Third Street, Chester, testified that the petitioner sold him a suitcase of used clothing on July 17, saying he was

making a ship in Philadelphia and would have no use for the clothing. Petitioner and a colored man walked into the store together. Petitioner sold a radio, a camera, and a suitcase containing clothes, for all of which Silverstein paid eight dollars. The watch was on petitioner's hand at the time. (R. 29-30.)

On cross-examination, Silverstein denied that petitioner had said that the clothes belonged to a sailor; his testimony was that petitioner had said he was the sailor. The witness admitted that another man had come into his store with petitioner, but said he did not know whether this other man was with petitioner or not. (R. 30.)

The district attorney then offered the tangible effects in evidence as follows (R. 30):

> "Mr. Johnson: I want to offer into evidence the wallet, the watch, which were identified and found—The watch was found in the possession of the defendant. This wallet, containing the papers of Mr. Blades, which was found in the jail cell that had been occupied by the defendant.
>
> "The Court: What about the radio?
>
> "Mr. Johnson: It has been recovered and returned to the owner."

Petitioner thereupon recalled Blades for further questioning, a step which the district attorney characterized as "He desires to call the prosecutor as his witness" (R. 30).

On further cross-examination, Blades denied meeting the petitioner on an earlier occasion, denied drinking beer with him, denied a conversation with petitioner, and denied leaving "the stuff" in the suitcase to be picked up (R. 31).

Thereafter the following colloquy took place between the court and the petitioner (R. 31-32):

> "The Court: Now then, Gibbs, you may, if you want to, take the stand and say anything you want to say,

but I warn you if you do, if you have any record of any prior conviction, any felonies or any misdemeanors in the nature of what we call crimen falsi, the commonwealth may offer the record of any convictions you may have had. I am warning you in advance. You may, however, take the stand and testify or you may refuse to take the stand and if you do refuse to take the stand, the commonwealth and the court may not comment unfavorably about your failure to take the stand and testify. I want to warn you fully before you do take the stand.

"Do you want to take the stand?

"The Defendant: No, I don't have anything to say in court.

"The Court: Do you have any witnesses you want to put on the stand?

"The Defendant: No, sir.

"The Court: Do you wish to argue it to the jury? You may, if you want to.

"The Defendant: No, sir; I don't believe so. I am not educated to talk to the people.

"The Court: Do you waive your speech?

"Mr. Johnson: I think I should make a few remarks to the jury."

So far as the record shows, the foregoing statement by the court was made in the presence and in the hearing of the jury.

Thereupon, the district attorney addressed the jury (R. 32), and the court delivered its charge (R. 32-37). With respect to petitioner's representation, the court said (R. 33):

"In this case, the defendant acts as his own lawyer, which he has a perfect right to do under the laws of this commonwealth. As he has presented no evidence of his own, except having called Mr. Blades and certain questions were asked Mr. Blades and certain answers made; that is the only evidence he presented."

After the close of the court's charge, the following occurred (R. 37):

"[The Court:] Any errors, omissions or corrections, Mr. Johnson?

"Mr. Johnson: None, Your Honor.

"The Court: Any errors, omissions or corrections that you want me to correct, Mr. Gibbs?

"The Defendant: No, sir.

"The Court: Take the case and dispose of it."

The jury retired—for how long does not appear—and returned with a verdict of guilty. Sentence was imposed immediately, as follows (R. 38-39):

"Mr. Johnson: I think it would be interesting for the jury to know the type defendant we have. Your Honor, here is one we have marked up on the left; the important one.

"Edward Gibbs, called.

"By the Court:

"Q. Gibbs, do you have anything to say before we impose sentence?

"A. No, I guess not.

"Q. How long have you been in jail?

"A. Two months and a half.

"Q. What is the matter with you; why can't you keep out of trouble?

"A. I don't know, sir.

"Q. You don't know why you can't do it? What do you do, get drunk or so. ething, or are you just ornery?

"Mr. Johnson: Don't you think this man would be better if he were sent to the Eastern Penitentiary?

"By the Court:

"Q. Do you realize you can be put away for the rest of your life?

"A. (No answer.)

"The Court: It is a wonder the district attorney doesn't indict you for it. You can be indicted.

"Mr. Johnson: If he comes back again, I will take it as my personal job to indict him.

"The Court: In 1928 you were found guilty of burglary, larceny, receiving stolen goods, before Judge Fronefield—one to two years, county jail. In 1931, plead guilty to larceny—$100 fine and costs, one to two years, Judge MacDade. 1932 found guilty of larceny and receiving stolen goods, $50 fine and costs, six months to three years in county jail, Judge Morrow. That is three. 1934 larceny, found guilty, $100 fine and costs, six months to three years in county jail; sentenced to one year in county jail for violation of parole; Judge Fronefield. That is four. 1937, receiving stolen goods, $10 fine and costs, one to three years county jail, sentence suspended by Judge MacDade. That is five. 1938, larceny; found guilty, one and a half to three years county jail, Judge Crichton. I don't believe there is anyone you missed up to now. You were before me a year ago. No, just last March. You beat that, not guilty. Now, here you are the seventh time.

"All I can do is give him two and a half to five years, if you don't want to indict these fourth offenders.

"SENTENCE

"On No. 417 September Sessions 1947, the sentence of the court is that you undergo imprisonment in the Eastern State Penitentiary at solitary confinement and hard labor for two and a half to five years and stand committed until this sentence be complied with. If I could give you life, I would do it.

"Take him away."

The habeas corpus proceedings, detailed above, pp. 1, 3-5, followed, after which petitioner timely filed a petition for certiorari in this court.

In his manuscript petition for certiorari, also filed *pro se*, petitioner again contended that he was denied constitutional

rights by reason of the denial to him of counsel, relying on *Powell* v. *Alabama*, 287 U. S. 45, and *Townsend* v. *Burke*, 334 U. S. 736, and pointing out (Pet. par. 13), that this court's decision in the *Townsend* case antedated the decision of the court below in this case.

The material allegations of the petition for certiorari, here set out as a matter of convenience, were as follows:

> "2. * * * the grounds for the Writ being that the Petitioner was convicted without due process of law in that he was denied the constitutional right of counsel at his trial."
>
> "3. * * * just before the case was called Assistant District Attorney Johnson asked the Petitioner if he had a lawyer. The Petitioner replied that he had no funds wherewith to engage an attorney and that he wished to have one appointed to represent him. Mr. Johnson told Petitioner to take a seat which Petitioner did, hoping that an appointed lawyer would come to talk the case over with him.
>
> "4. However, no lawyer appeared and no counsel was appointed by the Court and the case was called a few minutes later.
>
> "5. The Petitioner did not know at the time that he had a right to counsel.
>
> "8. The Petitioner * * * did not know that he had the right to counsel and so the case proceeded with the control of the case completely in the hands of the Commonwealth."

Summary of Argument

I. Here and in the Court below, petitioner made the basic claim that, in violation of rights guaranteed him by the Federal Constitution, he had been denied counsel and forced to act as his own counsel. It is clear that Pennsylvania's denial of relief in such a situation rests upon its interpreta-

tion of the XIV Amendment, and also clear that, after denial, the case is properly before this Court for review. *Vreges v. Pennsylvania*, 335 U. S. 437.

II. A. Unlike most other right-to-counsel cases arising under the XIV Amendment, this one turns on the capacity of a layman to conduct a trial without the assistance of counsel, not simply on his competence to decide how he should plead; and the difference is a significant one. In many situations, true enough, there is more to pleading guilty or not guilty than the mere admission or denial of having done the act charged. But the accused can always defend himself at arraignment if he has the wit—and the composure—to persist in a plea of not guilty. It is far different at an actual trial. Persons with legal education, even lawyers of many years' standing at the bar, are frequently not qualified to try a case. *A fortiori* a layman is not, and to suggest that petitioner was so qualified simply because his prior criminal record indicates a modicum of familiarity with the procedure in criminal causes is equivalent to urging that a man is qualified to be a barber because he has frequently had his hair cut.

B. But it is not necessary to rest on generalized assertions; the record in this case convincingly demonstrates that petitioner was not competent to defend himself.

He was unable to ask questions properly. He was unable to recognize and hence to object to incompetent evidence; the record is replete with inadmissible hearsay. He lacked the education to address the jury. And he was unable to protect himself against being taken advantage of by prosecution and court alike.

Thus, it was error under Pennsylvania law to rule that the recall of Blades for further cross-examination made him petitioner's witness; it was error to prevent petitioner from attempting to impeach Blades for bias; and it was serious

error to force petitioner in effect to claim his privilege against self-incrimination before the jury by warning him, in the presence of the jury, that the record of his prior criminal convictions could be shown if he took the stand. This was a signal to the jury that petitioner was an individual with a bad record. In none of these instances would petitioner have been disadvantaged had he had counsel at his side to defend him.

C. Petitioner's inadequate attempts to defend, together with the hostile attitude of the trial court, establish that he was denied due process of law in being required to proceed without counsel.

For the judge here was far from exemplifying the traditional common law rule (of the days when persons accused of felony were not entitled to be heard by counsel), "that the judge shall be counsel for the prisoner." The court here never interceded in behalf of the prisoner, and was consistently hostile to him, not only in respect of the unfavorable rulings already detailed, but notably in connection with the sentencing. There the trial judge said, "If I could give you life, I would do it;" and, coming upon an acquittal in the course of reading petitioner's record, said, "You beat that, not guilty."

The foregoing circumstances bring the present case within the rule, reaffirmed at the last Term in *Townsend* v. *Burke*, 334 U. S. 736, 739, "that the disadvantage from absence of counsel, when aggravated by circumstances showing that it resulted in the prisoner actually being taken advantage of, or prejudiced, does make out a violation of due process."

III. If the Court agrees with petitioner's contention, set out in the preceding paragraph, then there is no need to go farther. If, on the other hand, the Court finds no such showing of unfairness in the circumstances of this case,

then it is necessary to inquire whether the XIV Amendment, properly construed, nevertheless entitles petitioner to his release (or, at the very least, to a hearing on the allegations of his petition for *habeas corpus*). Petitioner does not propose to reargue *Betts* v. *Brady*, 316 U. S. 455, or *Bute* v. *Illinois*, 333 U. S. 640, which, he recognizes, appear to foreclose him. But there remain considerations of constitutional interpretation to which this Court's attention has not yet been drawn, and which, it is believed, should now be canvassed.

A. This Court's interpretation of the VI Amendment has rejected narrow historical tests in determining the proper scope of its protection for the individual.

Historically, the English law affirmatively denied counsel to a person charged with treason until 1695, and to one charged with felony until 1836. The VI Amendment must be read in the light of that background, and together with our own Act of 1790, which provided for the assignment of counsel only in capital cases. If the VI Amendment had been contemporaneously understood to require such appointment for indigent defendants in all cases of felony, the Act of 1790, passed while that Amendment was in process of ratification, would not have been so limited. By any strictly historical test, the decision in *Johnson* v. *Zerbst*, 304 U. S. 458, effected a marked departure from the earlier understanding of the meaning of the VI Amendment. It is abundantly clear that, in extending the protection of the VI Amendment to the helpless, the uneducated, and the indigent, this Court has conformed to modern standards of what a civilized society requires in the prosecution of crime, and has not felt itself fettered either by the shackles of historical consistency or by the harsher standards of an earlier age.

B. Conceding the soundness of *Adamson* v. *California*, 332 U. S. 46, and of *Bute* v. *Illinois*, 333 U. S. 640, insofar as

they reaffirm the traditional view that the XIV Amendment was not considered at the time of its adoption to include the specific guaranties of the first eight amendments, it still does not follow that the historical technique is necessarily the correct one.

Thus, as late as 1922, this Court said that the XIV Amendment imposed no obligation on the States with respect to freedom of speech. *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 538, 543. Five years later, the precise contrary was assumed, see *Gitlow* v. *New York*, 268 U. S. 652, 666, and now it is settled that the freedom of speech protected by the I Amendment is included within the liberty protected by the XIV Amendment. E.g., *Stromberg* v. *California*, 283 U. S. 359, 368; *Thornhill* v. *Alabama*, 310 U. S. 88, 95.

In the field of regulatory legislation, this Court rejected the notion of following historical precedents from earlier days in *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, where it struck down such legislation, nor did it rely on such precedents in *Nebbia* v. *New York*, 291 U. S. 502, a case which marked the beginning of the trend toward sustaining such enactments.

C. Insofar as the right to counsel is an element of Due Process of Law, as this Court first recognized it to be in *Powell* v. *Alabama*, 287 U. S. 45, 60, reliance on historical precedents was frankly disavowed. Why then should there be more sanctity in the concept of Due Process of Law as it prevailed in 1868?

The rule of *Betts* v. *Brady*, 316 U. S. 455, is not an absolute; it has been modified; and today both Michigan and Illinois have, under the impetus of decisions of this Court, provided for the appointment of counsel where no such provision had been made before. Thus the standard of what constitutes Due Process of Law with respect to the

assignment of counsel in these two states has been changed from the standards which prevailed there earlier, just as the standard of what is involved in the right to have the assistance of counsel in the federal courts changed between 1791 and 1938.

Due Process of Law is not something static which historians can recreate today after the manner of the archeologists who exhume fossilized matter to demonstrate how life went on ages ago. As Holmes said, "Historic continuity with the past is not a duty, it is only a necessity." Petitioner submits that there is no more reason to cling to historic continuity in this field than in any of the others just discussed. Today's meaning of the XIV Amendment as a conception of fundamental justice requires that no defendant accused of felony shall be forced to defend himself without the assistance of counsel against a prosecution conducted by a trained lawyer in any court of the land, state or federal. The essential inequality of the contest otherwise, regardless of the tribunal wherein it takes place, is, necessarily, a denial of what the present age considers fundamental justice.

ARGUMENT

I. Petitioner's Claim of Federal Right Was Properly Made Below and Is Properly Before This Court

Here and in the court below, petitioner made the basic claim that, in violation of rights guaranteed him by the Federal Constitution, he had been denied counsel and forced to act as his own counsel (R. 3; Pet. for Cert., pars. 2-5, 8, *supra*, p. 13).

The petition for habeas corpus was within the original jurisdiction of the Supreme Court of Pennsylvania. 17 Pa. Stat. Ann. § 48; *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41; *Commonwealth ex rel. Penland* v. *Ashe*, 341

Pa. 337. The circumstance that petitioner's rights were rested on the Sixth Amendment in the petition for habeas corpus, rather than on the Fourteenth, will of course be disregarded in view of his lack of legal learning, see *Price* v. *Johnston*, 334 U. S. 266, 292, and cases there cited; and certainly it did not mislead the law officers of the Commonwealth, who asserted "that he was not denied his constitutional rights under the averments as set forth in his petition" (R. 8), and who relied on the *Uveges* case in 161 Pa. Super. 58, which, after leave to appeal had been denied by the Supreme Court of Pennsylvania, 161 Pa. Super. xxv, was later reversed here. 335 U. S. 437. Moreover, it is clear that the Supreme Court of Pennsylvania rests its denial of relief in cases such as this one on an interpretation of the XIV Amendment. *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41. There the present Chief Justice of Pennsylvania, speaking for the court, said (344 Pa. at 48-49, 49-50):

> "The right guaranteed by the Pennsylvania Constitution (Art. 1, sec. 9) of an accused to be '*heard by counsel*' has never been challenged or abridged in this Commonwealth; the right of an accused to be *supplied with counsel when none is asked for* was never until recent years asserted in this Commonwealth. This court has never countenanced the idea that the accused in a criminal case when the charge is other than murder is being deprived of a constitutional right if he is not informed in advance of his trial that counsel will be assigned him upon request. * * *
>
> "The fact that the Supreme Court of Pennsylvania has never during its two and a half centuries of existence deemed it the duty of trial courts to provide (except in capital cases) counsel for accused persons where none was asked for strongly supports the postulate that the failure to provide counsel under the circumstances here present is *not* a denial of 'due process of law', a fundamental of Anglo-Saxon justice

which has been expressed in every constitution of this state and upheld by its judiciary since the American Union was formed." [Italics in original.]

Consequently the denial of the petition for habeas corpus by the Supreme Court of Pennsylvania adequately raised the Federal constitutional question as to denial of the right to counsel, and the case is properly here for review. *Uveges* v. *Pennsylvania*, 335 U. S. 437, 438-439.

While the *Uveges* case disposes of any question which might be raised as to the jurisdiction of this Court, it is proper to point out that, although the allegations of the petition for certiorari are somewhat more detailed than those in the petition for habeas corpus, no new matter was relied on or presented here which was not before the Supreme Court of Pennsylvania. And it is likewise proper to point out that the lapse of time between the two petitions has not resulted in any such improved, amended or emended allegations as have in the past been encountered in cases involving successive petitions seeking relief from confinement. *E.g.*, *Von Moltke* v. *Gillies*, 332 U. S. 708; *Price* v. *Johnston*, 334 U. S. 266.

II. Prior Decisions of This Court Establish That the Denial of Counsel Here, in the Circumstances of the Present Case, Amounted to a Deprivation of Due Process of Law.

A. *Unlike most other right-to-counsel cases arising under the XIV. Amendment, this one turns on the capacity of a layman to conduct a trial without the assistance of counsel, not simply his competence to decide how he should plead; and the difference is significant.*

With but a few exceptions, each of which is fully discussed immediately below, every case in this Court which

has involved a claim under the XIV Amendment arising out of an alleged denial of counsel has turned on the competence of a defendant to decide how he should plead; the stock pattern has been a plea of guilty induced by duress, or entered through ignorance, frequently by an accused of tender years or with little or no education. *Smith* v. *O'Grady*, 312 U. S. 329; *Williams* v. *Kaiser*, 323 U. S. 471; *Tomkins* v. *Missouri*, 323 U. S. 485; *House* v. *Mayo*, 324 U. S. 42; *White* v. *Ragen*, 324 U. S. 760; *Rice* v. *Olson*, 324 U. S. 786; *Canizio* v. *New York*, 327 U. S. 82; *Carter* v. *Illinois*, 329 U. S. 173; *De Meerleer* v. *Michigan*, 329 U. S. 663; *Foster* v. *Illinois*, 332 U. S. 134; *Gayes* v. *New York*, 332 U. S. 145; *Marino* v. *Ragen*, 332 U. S. 561; *Bute* v. *Illinois*, 333 U. S. 640; *Gryger* v. *Burke*, 334 U. S. 728; *Townsend* v. *Burke*, 334 U. S. 736; *Uveges* v. *Pennsylvania*, 335 U. S. 437.

Only four cases involving claims of denial of the right to counsel in circumstances alleged to violate the guaranty of Due Process of Law of the XIV Amendment were cases that actually went to trial. *Powell* v. *Alabama*, 287 U. S. 45; *Betts* v. *Brady*, 316 U. S. 455; *Hawk* v. *Olson*, 326 U. S. 271; *Wade* v. *Mayo*, 334 U. S. 672. The claim was sustained, at least to the extent of according a hearing, in all of these except *Betts* v. *Brady*, and there much was made of the circumstance that the question of the commission of the offense charged was not in issue. Mr. Justice Roberts, speaking for a majority of the Court, said (316 U. S. at 472):

> "In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. The defense was an alibi. Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant."

with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

It is no answer to suggest (cf. R. 7, 8; see also *Betts v. Brady*, 316 U. S. 455, 472) that the present petitioner's prior criminal record indicates some familiarity with legal procedure or of the practice in criminal causes. It might as well or as sensibly be urged that a man is qualified to be a barber because he has frequently had his hair cut. But there is no need to rest on generalized assertion; the record is here to show the extent and scope of petitioner's forensic abilities.

B. *The record in this case convincingly demonstrates that the petitioner was not competent to defend himself.*

It is only necessary to read the record of trial in this case to appreciate the petitioner's utter inability to conduct his own defense. He was unable to ask questions properly, he was unable to recognize and hence to object to incompetent evidence, he was unable to address the jury, and he was unable to protect himself against being taken advantage of by prosecution and court alike.

(i) Petitioner was unable to ask questions properly. Many of the "questions" put by petitioner to the prosecuting witness Blades were simply assertions of his own (R. 21-22, 31). The same is true in respect of the "questions" asked Mrs. Lafield (R. 25) and Constable Fleming (R. 27-28). In the case of the last witness, the district attorney objected that petitioner was testifying instead of asking questions, and the latter was warned accordingly by the trial judge (R. 28; colloquy quoted *supra*, p. 8).

(ii) Petitioner was unable to recognize and hence to object to incompetent evidence. The record is replete with inadmissible hearsay:

Blades: "Then she [witness's mother] tells me about him [petitioner] being there". (R. 20).

Mrs. Lafield: "* * * and I said 'Eddy Gibbs has them because he has been in the house this morning.'" (R. 25)

Constable Fleming: "I got a telephone call from the Chief of Police, Mr. Miller, to go up to Mrs. Lafield's to investigate a robbery that occurred there." (R. 25-26).

"I asked Jim, where was the suitcase. He said, the suitcase was by the bed." (R. 26)

"I went to three pawnshops and they gave me a description of Edward Gibbs * * *." (R. 26)

"Mr. Blades identified the articles taken." (R. 26)

"* * * the watch was exposed and he had on this same straw hat. Mr. Blades identified both of them." (R. 26)

"Q. Who operates the pawnshop?

"A. A fellow named James.

"Q. Did he describe a man like this defendant?

"A. Yes * * *" (R. 27)

Silverstein: "Q. Later this was identified as the clothing of Mr. Blades?"

"A. Yes." (R. 29)

moreover, unmistakably, suggests that the trial judge had prior, irregular, and extra-judicial knowledge of that fact.

But the incident which perhaps most clearly indicates the bias which animated the trial judge occurred in connection with the sentencing of petitioner, when the judge, after adjudging the maximum sentence permissible under the law (see 18 Pa. Stat. Ann. 4807; 19 *id.* 1057)[3], said (R. 39),

> "If I could give you life, I would do it."

Earlier, after reciting the convictions noted in petitioner's record (while omitting discharges and acquittals), the judge had said (R. 39),

> "You were before me a year ago. No, just last March. *You beat that, not guilty.*"

The italics in the foregoing quotation have been added; rarely is judicial bias so clearly demonstrated.

It is submitted that the unfairness and prejudice of the presiding judge which the present record reflects is sufficient, taken in conjunction with petitioner's obvious inability to defend, to bring this case within *Townsend* v. *Burke*, 334 U. S. 736. The question is not one of the petitioner's guilt or innocence of the charge of larceny, it is whether in the circumstances disclosed by the present record he has been accorded a fair trial consistent with those traditional safeguards which are embraced within the concept of Due Process of Law. That question is answered in the negative by decisions of this Court.

Thus, even in *Betts* v. *Brady*, 316 U. S. 455, this Court recognized that there might well be cases where an accused, tried without counsel, might be at a disadvantage because unrepresented. The Court said (316 U. S. at 472-473):

> "As Judge Bond says, the accused was not helpless, but was a man forty-three years old, of ordinary intel.i-

[3] As the trial judge said (R. 39), "All I can do is to give him two and a half to five years, if you don't want to indict these fourth offenders."

gence, and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction. Only recently the Court of Appeals has reversed a conviction because it was convinced on the whole record that an accused, tried without counsel, had been handicapped by the lack of representation."

In *Wade* v. *Mayo*, 334 U. S. 672, where relief was granted, the findings of the habeas corpus court disclosed a situation not very different from this one (334 U. S. at 683):

"'It appears that petitioner, at the time of his trial in the Criminal Court of Record of Palm Beach, Florida, was eighteen years old, and though not wholly a stranger to the Court Room, having been convicted of prior offenses, was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself. It is admitted by the Judge who presided at petitioner's trial on March 6, 1945 that petitioner in open Court, before trial commenced, requested said Judge to appoint counsel for him, but the request was denied and petitioner placed on trial without counsel. . . . The denial of petitioner's request in the circumstances here involved constitutes a denial of due process, contrary to the 14th Amendment of the Federal Constitution, which renders void the judgment and commitment under which petitioner is held . . .'

"As the Circuit Court of Appeals pointed out, the evidence at the hearing before the District Court further showed that during the progress of the trial Wade (a) was advised by the trial judge of his right to challenge jurors and excuse as many as six without reason, a

right which he did not exercise; (b) was afforded an opportunity, which he accepted, to cross-examine state witnesses; (c) took the stand and testified in his own behalf; and (d) was offered the privilege of arguing his case to the jury but declined, as did the prosecuting attorney."

Two cases decided at the last Term, both from Pennsylvania as this one is, point up the distinction now in question. In *Gryger* v. *Burke*, 334 U. S. 728, 731, a majority of the Court was of opinion that "no exceptional circumstances" were present. But in the companion case of *Townsend* v. *Burke*, 334 U. S. 736, argued by the same counsel and decided at the same time, such circumstances were present; and the Court pointed out (334 U. S. at 739):

> "Only recently a majority of this Court reaffirmed that the due process clause of the Fourteenth Amendment does not prohibit a State from accepting a plea of guilty in a non-capital case from an uncounseled defendant. *Bute* v. *Illinois*, 333 U. S. 640. In that, and in earlier cases, we have indicated, however, that the disadvantage from absence of counsel, when aggravated by circumstances showing that it resulted in the prisoner actually being taken advantage of, or prejudiced, does make out a case of violation of due process."

This petitioner was taken advantage of. This petitioner was prejudiced, by reason of lack of counsel; he was denied due process of law.

Nothing, it is submitted, turns on the circumstance that this petitioner was 34 years old (R. 9) and was sentenced to two and a half to five years whereas the petitioner Wade of *Wade* v. *Mayo*, 334 U. S. 672, was 17 years old and was sentenced to five years. Both lacked the capacity to defend themselves effectively. And if it be suggested that in the *Wade* case there was a finding of incompetence by the trier

of facts, see 334 U. S. at 683-684, whereas there is none here, then the short answer is that this petitioner should be granted a hearing where that fact can be determined. At the very least, he is entitled to an opportunity to establish his allegations, and to have a hearing where all the facts bearing on the denial to him of counsel may be developed. See *Hawk* v. *Olson*, 326 U. S. 271, 279.[4]

Here, as in *Townsend* v. *Burke*, 334 U. S. 736, 741, it is entirely possible that the presence of counsel might not have changed the result. But counsel would, by seasonable objections and by competent conduct of the defense, have forced adherence by prosecution and trial court to those requirements of fair play which the Due Process Clause of the XIV Amendment guarantees, and which in the absence of counsel this petitioner was unable to obtain for himself.

III. In Any Event, and Apart From the Particular Circumstances of This Case, Application of the Standards Whereby the VI Amendment Has Been Interpreted to Require the Appointment of Counsel for All Indigent Prisoners Charged With Felony Requires a Like Interpretation of the XIV Amendment, Particularly in the Light of That Amendment's Recently Expanded Scope.

If the Court holds that the circumstances of the present case reflect such an over-reaching of the petitioner by reason of his lack of legal representation as to bring the situation within the doctrine of *Townsend* v. *Burke*, 334 U. S. 736, then there is no need to go farther. If, on the other hand,

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[4] The suggestion of waiver which appears in par. 8 of the District Attorney's answer below (R. 7) might appropriately be canvassed at such a hearing. The right to counsel can of course be waived, provided the accused does so intelligently and understandingly after being fully advised of his rights. *Carter* v. *Illinois*, 329 U. S. 173; see *Uveges* v. *Pennsylvania*, 335 U. S. 437, 441; cf. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269; *Von Moltke* v. *Gillies*, 332 U. S. 708.

In later cases, this aspect of the *Betts* decision has been stressed. Thus, in *Bute* v. *Illinois*, 333 U. S. 640, 676, the Court was at pains to point out that in *Betts* v. *Brady* "the commission or nature of the offense charged was not the issue because the defense was merely that of an alibi."

Up to now, no decision has focussed on the vital distinction, so far as a layman is concerned, between pleading and actually trying a case. True, this Court in many cases has emphasized the pitfalls in store for those not learned in the law when charged with crime and called upon to plead. See, e.g., *Rice* v. *Olson*, 324 U. S. 786, 789-791.

But the step from arraignment to trial is a long one, particularly for the layman. After all, insofar as the answer to the question "Guilty or not guilty?" reflects merely the doing of an act, any defendant who is *compos mentis* is qualified to give it. Any layman in the possession of his faculties knows whether, in fact, he hit his neighbor on the head, or whether he took the mailbags out of the post office, or whether he shot the deceased. On that basic issue he does not need counsel, he need only search his conscience.

Of course there are questions that go beyond the mere doing of the act charged, which will occur only to one trained in the law. Did the court have jurisdiction? See *Rice* v. *Olson*, 324 U. S. 786; cf. *Bowen* v. *Johnston*, 306 U. S. 19. Was the evidence against the accused lawfully obtained? Does the act charged constitute a crime? Cf. *Von Moltke* v. *Gillies*, 332 U. S. 708. Does a plea of guilty have consequences which extend beyond punishment for the particular crime charged? *Townsend* v. *Burke*, 334 U. S. 736. In such situations, as this Court has recognized, the fundamental notions of fairness inherent in the concept of Due Process require the assistance of counsel for the layman accused of crime who has not intelligently waived his rights.

Far greater difficulties are involved, however, when a person actually goes to trial. Every lawyer knows that the conduct of an actual trial requires a combination of skills. A trial lawyer needs, at a minimum, a knowledge of substantive law, a knowledge of the rules of evidence, a quick mind, a ready address, and a working knowledge of the processes of human psychology. And every lawyer knows that trial practice, of all fields of law, requires experience and training. Many law school graduates, just preparing to take their bar examinations, can write passable briefs on points of law. But, except in the rarest instances, they do not know how to try a case. And every lawyer likewise knows that thousands of eminent and respected practitioners, frequently of long standing at the bar, never have had and do not now have the qualities essential for an effective trial lawyer.

That being so, the layman is obviously at a disadvantage when he embarks upon so difficult an enterprise. He can defend himself adequately at the arraignment if he has the wit—and the composure—to persist in a plea of not guilty. But at a trial, mere denial is insufficient. The layman needs, but does not know substantive law. He needs to know, but actually knows nothing, of evidence or trial practice. He knows only that he is at a disadvantage; the assurance of even the glib person melts away; and of course those who lack schooling, or who are timid, or who reflect the reticence of the underprivileged, are at an utter loss. These are facts of common knowledge. Everyone who has ever been in a courtroom and has seen the undefended defendants shuffling past knows the truth of these assertions. And this Court is aware of them; *Powell* v. *Alabama*, 287 U. S. 45, 69, often quoted on this point, still bears repetition:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged

Another instance of incompetent testimony was the District Attorney's unsworn offer of proof, as follows (R. 30):

> "Mr. Johnson: I want to offer into evidence the wallet, the watch, which were identified and found—The watch was found in the possession of the defendant. This wallet, containing the papers of Mr. Blades, which was found in the jail cell that had been occupied by the defendant.
>
> "The Court: What about the radio?
>
> "Mr. Johnson: It has been recovered and returned to the owner."

(iii) Petitioner was unable to address the jury; the stark record is impressively eloquent on this point (R. 31-32):

> "The Court: Do you wish to argue it to the jury? You may, if you want to.
>
> "The Defendant: No, sir; I don't believe so. I am not educated to talk to the people."

(iv) Petitioner was unable to protect himself against being taken advantage of by prosecution and court alike.

(a) The prosecution urged (R. 30), and the court charged the jury (R. 33), that when petitioner recalled the prosecuting witness Blades for further cross-examination he made Blades his own witness. The practical effect of this ruling was prejudicial, as it made the prosecuting witness's testimony binding on petitioner, and prevented the use of leading questions in the further examination of that witness. *Commonwealth* v. *Reeves*, 267 Pa. 361, 362-363; *Commonwealth* v. *Eisenhower*, 181 Pa. 470, 476. And while of course the recall of a witness for further cross-examination is a matter lying within the discretion of the trial judge, see *Commonwealth* v. *Sladko*, 333 Pa. 1, 6, there is nothing in the present record to show why it should not have been permitted here. To have refused this privilege to a defendant unrepresented by counsel, when under the decisions it could properly have

been extended to the prosecution (*Coyle* v. *Commonwealth*, 104 Pa. 117, 131; *Commonwealth* v. *Eisenhower*, *supra*), amounted, it is submitted, to a clear abuse of discretion.

(b) As has been noted, pp. 5, 7, 9, above, petitioner was defending the present charge of larceny on the ground that he had taken the property in question pursuant to an understanding with the prosecuting witness (R. 22, 27). In those circumstances, it was clearly proper for petitioner to show on cross-examination that the witness had previously made a baseless criminal charge against him. *Commonwealth* v. *Farrell*, 187 Pa. 408, 423; see 3 Wigmore, *Evidence* (3d ed. 1940) sec. 950. Yet the trial judge prevented cross-examination designed to show just that (R. 22; see p. 6, *supra*).

(c) Finally, and this was even more markedly unfair, although the trial judge warned petitioner that his taking the stand would permit the Commonwealth to offer the record of his prior convictions (R. 31), that warning, so far as the record shows, was made in the presence and in the hearing of the jury. Its obvious effect was a signal, a signal to the jury that petitioner was an individual with a bad record and a prior history of crime, who because of that reason was unwilling to take the stand.

The question here is not, as in *Adamson* v. *California*, 332 U. S. 46, whether what was done at the trial in a situation where an accused was defended by counsel conformed to the standards of the Federal Constitution; the inquiry here is whether what was done to an accused unrepresented by counsel accorded him the rights and privileges which were his as a matter of state law, and which counsel would and could have obtained for him.

The situation reflected by the present record clearly contravened the standards for the protection of the privilege against self-incrimination which the Pennsylvania courts have laid down and enforced. For, by reason of the trial

judge's remarks in the presence of the jury, petitioner was in effect called upon to claim his constitutional rights before the jury; and under Pennsylvania law that was error. *Philadelphia* v. *Cline*, 158 Pa. Super. 179, 185; cf. *Commonwealth* v. *Valeroso*, 273 Pa. 213.

Thus, in *Philadelphia* v. *Cline*, 158 Pa. Super. 179, an action to recover statutory penalties, the defendants were called to testify as under cross-examination, which was proper only in a civil action. The Superior Court held, however, that in such a proceeding the defendant had the same constitutional privilege to refuse to testify against himself as if the action were brought in the criminal court; and, in reversing the judgment for the plaintiff, said (158 Pa. Super. at 185):

> "In those cases where a defendant has a privilege to refuse to testify, it is error to call upon him to take the stand in the presence of the jury and require him to claim his constitutional safeguards, as the refusal to answer is an eloquent incriminatory act and the spectacle produced, if permitted, would effectually emasculate the time-honored principles extending the haven of silence to one who may by the outcome of litigation be subjected to the imposition of a fine or forfeiture."

A comparable situation was presented in *Commonwealth* v. *Valeroso*, 273 Pa. 213, where the defendant, on trial for murder, was called upon in the presence of the jury to produce a certain letter, the contents of which would have tended to establish a motive for his commission of the crime. Defendant's conviction was reversed by the Supreme Court of Pennsylvania, which held that such a call on the defendant to produce the letter was violative of his constitutional privileges, and that the trial court erred in permitting the call to be made before the jury.

In none of the instances recited above would petitioner have been thus disadvantaged had he had counsel at his side to defend him.

C. Petitioner's inadequate attempts to defend, together with the hostile attitude of the trial judge, establish that he was denied due process of law in being required to proceed without counsel.

If, exemplifying the traditional English common law justification for denying counsel to one charged with crime (see 4 Bl. Comm. *355), "that the judge shall be counsel for the prisoner," the court in this case had acted in that capacity, it might perhaps be contended that petitioner could conceivably have had a fair trial. Cf. *Betts* v. *Brady*, 316 U. S. 455, 472, and 472 n. 31.

But the trial judge in this case assumed no such role. On the contrary, his actions and rulings reflect a consistent attitude of hostility towards the accused; at no point, so far as this record discloses, did he ever intercede on petitioner's behalf. Even on the matter of the prosecuting witness's recall for further questioning, which the District Attorney was quick to characterize as (R. 30) "He desires to call the prosecution as his witness," the trial judge made no move to suggest that petitioner was simply recalling the Commonwealth's witness for further cross-examination, a suggestion which any fair-minded judge would of course at once have made.

The ruling (*supra* pp. 6, 27) which prevented petitioner from impeaching the prosecuting witness for bias was error under Pennsylvania law, and again suggests no inclination to assist an accused acting *pro se;* and the same is true of the highly erroneous and prejudicial warning, in the presence of the jury, which all but said that petitioner had a long criminal record. The latter incident,

this Court is of the opinion that no such showing of fundamental unfairness has been made, then it becomes necessary to inquire whether the XIV Amendment, properly construed, nevertheless entitles petitioner to his release, or, at the very least, to a hearing on the allegations of his petition for *habeas corpus*.

Petitioner is of course fully aware that the broader question may appear to be foreclosed by the decisions of this Court in *Betts* v. *Brady*, 316 U. S. 455, and *Bute* v. *Illinois*, 333 U. S. 640. Petitioner does not intend to reargue the ground covered in the cases last cited. But examination of those opinions and of the briefs in the most recent cases involving claims of the denial of due process of law under the XIV Amendment by reason of the denial of counsel indicate that there are still considerations of constitutional interpretation which have not been canvassed, and to which it is believed that this Court's attention should be drawn. Briefly, it is petitioner's contention that, conceding the historical validity of the majority opinions in *Betts* v. *Brady*, 316 U. S. 455, and in *Bute* v. *Illinois*, 333 U. S. 640, it does not follow that the historical standard is the correct one. Petitioner will demonstrate that the historical standard has not been followed in the interpretation of the VI Amendment's guaranty of the right to counsel, that the interpretation of the scope of the XIV Amendment in other respects, notably in the field of freedom of speech and freedom of the press, has likewise departed from theretofore accepted historical analysis, and that reason and consistency alike require that the concept of due process of law be similarly interpreted, that it be expanded to conform to modern views, and that it should not be confined within the limitations of 1868 any more than the present interpretation of the VI Amendment has been straight-jacketed within the views of 1791.

A. *This Court's interpretation of the VI Amendment has rejected narrow historical tests in determining the proper scope of its protection for the individual accused of felony.*

In order to appreciate the scope of the VI Amendment at the time of its submission to the States in 1789 and at the time of its adoption in 1791, it is necessary to examine the English common law of that period.

Historically, of course, the harsh doctrine of the English common law was that an individual accused of treason or of felony was not entitled to have counsel appear for him or to represent him at his trial. The pages of the early volumes of Howell's *State Trials* are full of the earlier practice. The first relaxation of this essentially barbarous rule of law came with the Treason Act of 1695, which for the first time permitted a person accused of treason to enjoy the assistance of counsel in his defense.[5]

In cases of felony however, the old rule continued, and even the ultra conservative Blackstone bemoaned its unfairness. 4 Bl. Comm. *355. While in practice it was eventually relaxed to some extent, the English subject accused of felony was not entitled as a matter of right to be represented by counsel until 1836, nearly half a century after our own Constitutional Convention. St. 6 & 7 Will.

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[5] With respect to the right to counsel, the Treason Act of 1695, St. 7 & 8 Will. III, c. 3, provided: "That from and after the five and twentieth day of *March*, in the year of our Lord one thousand six hundred ninety six * * * every such person so accused and indicted, arraigned or tried for any such treason, as aforesaid, or for misprision of such treason, from and after the said time, shall be received and admitted to make his and their full defence, by counsel learned in the law, * * * and in case any person so accused or indicted shall desire counsel, the court before whom such person or persons shall be tried, or some judge of that court, shall and is hereby authorized and required, immediately, upon his or their request, to assign to such person and persons such and so many counsel, not exceeding two, as the person or persons shall desire, to whom such counsel shall have free access at all seasonable hours; any law or usage to the contrary notwithstanding."

IV, c. 114, § 1; 9 Holdsworth, *History of English Law*, p. 235; 1 Stephens, *History of the Criminal Law of England*, pp. 424-425.

Meanwhile, however, the practice in the American colonies early reflected a more liberal and enlightened rule. One by one, as the opinion of this Court in *Powell* v. *Alabama*, 287 U. S. 45, 61-65, shows, the American colonies permitted representation by counsel and provided for the appointment of counsel in capital cases. See e.g., Pennsylvania's Act of May 31, 1718, 19 Pa. Stat. Ann. 783. It is in the light of this background, English and American, that the VI Amendment must be viewed. That Amendment, having regard to the pre-existing law, guaranteed an American accused of felony in the federal courts the right to be represented by counsel, a right which was not his under the English common law. And the only circumstance in which he was entitled to have counsel provided for him by the community was if he was accused of a capital offense. The Act of April 30, 1790 (later R.S. 1034, 18 U.S.C. (1946 ed.) 563, and now 18 U.S.C. (1948 revision) 3005) well illustrates the Founders' understanding of the scope of the contemporaneously submitted amendment: That act provided:

> "• • • that every person so accused and indicted for any of the crimes aforesaid [treason and other capital offenses], shall also be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free access at all seasonable hours; • • • "

If the VI Amendment required and was contemporaneously understood to require the appointment of counsel for indigent defendants in all cases of felony, why should

the Act of 1790 have been so limited? The short of the matter is that the broad interpretation which reads the VI Amendment as conferring an absolute right to the appointment of counsel (as distinguished from the privilege of providing counsel), an interpretation which dates from *Johnson* v. *Zerbst*, 304 U. S. 458, reaffirmed in *Walker* v. *Johnston*, 312 U. S. 275, and now accepted without substantial question, see Rule 44, F. R. Crim. P.; cf. *Von Moltke* v. *Gillies*, 332 U. S. 708, represents a substantial departure from the scope of that Amendment as if was understood in 1791 and for many years thereafter.

As late as 1932, this Court stated that the right to a fair hearing included the right to the aid of counsel when desired *and provided*. See *Powell* v. *Alabama*, 287 U. S. 45, 68, where the Court said:

> "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired *and provided* by the party asserting the right." [Italics added.]

A little later, soon after the decision in *Johnson* v. *Zerbst*, 304 U. S. 458, a federal circuit judge of wide experience stated his understanding of the guarantee of right to counsel in the following terms (*Saylor* v. *Sanford*, 99 F. 2d 605, 607 (C. C. A. 5), *per* Sibley, J.):

> "It has never been understood that the federal courts were bound by the Constitution to furnish accused persons with counsel. A lawyer at the request of the court will represent a person unable to employ counsel, but I doubt that he ought or that the court could compel him to represent one able to employ counsel but unwilling. There are proposals pending before Congress to provide for a public defender, and for paying lawyers to defend indigent persons in some cases. All these arrangements for the defense of poor persons are acts of mercy, perhaps justice, but they are not re-

> quired by the constitutional provision and have never been supposed to be."

And a careful student of criminal procedure, now a United States District Judge, referred in 1944 to "the marked departure effected by the decision in *Johnson* v. *Zerbst*" (Holtzoff, *The Right of Counsel under the Sixth Amendment*, 20 N.Y.U.L.Q. Rev. 1, 10), and summed up the understanding of the bar as follows (20 N.Y.U.L.Q. Rev. at 7-8):

> "It is probably safe to say that from its adoption in 1791 until 1938, the right conferred on the accused by the Sixth Amendment 'to have the assistance of counsel for his defense' was generally understood as meaning that in the Federal courts the defendant in a criminal case was entitled to be represented by counsel retained by him. It was not assumed that this constitutional privilege comprised the right of a prisoner to have counsel assigned to him by the court if, for financial or other reasons, he was unable to retain counsel. The Sixth Amendment was not regarded as imposing on the trial judge in a Federal court the duty to appoint counsel for an indigent defendant."

It is thus abundantly clear that, in extending the protection of the VI Amendment to the helpless, to the uneducated, and to the indigent, this Court has conformed to modern standards of what a civilized society requires in the prosecution of crime and has not felt itself fettered either by the shackles of historical consistency or by the harsher standards of an earlier age.

B. *This Court's interpretation of the XIV Amendment in respects other than the one here in question has likewise rejected the historical approach.*

Petitioner here does not question the decisions of this Court in *Betts* v. *Brady*, 316 U. S. 455, in *Adamson* v. *Cali-*

fornia, 332 U. S. 46, or in *Bute* v. *Illinois*, 333 U. S. 640, insofar as they hold that, as a matter of history, the XIV Amendment was not considered at the time of its adoption in 1868 to include the specific guaranties of the first eight amendments. Petitioner is content to accept the traditional view on this point, which is set out in cases such as *Hurtado* v. *California*, 110 U. S. 516, *Twining* v. *New Jersey*, 211 U. S. 78, and *Palko* v. *Connecticut*, 302 U. S. 319.

But petitioner does urge the significance of the undoubted fact that this Court has in numerous respects steadily expanded the meaning of the XIV Amendment in a manner wholly consistent with accepted concepts of basic liberties and fundamental rights, but in disregard of purely historical techniques.

A suggestive example is the scope of the XIV Amendment's protection for freedom of speech. As late as 1922, this Court expressly stated that "the Constitution of the United States imposes upon the States no obligation to confer upon those within their jurisdiction either the right of free speech or the right of silence", and that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restriction about 'freedom of speech' or the 'liberty of silence' * * *." *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 538, 543. Yet, just three years later, in *Gitlow* v. *New York*, 268 U. S. 652, 666, the Court said that "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

At present, of course, the matter does not rest on assumption; it is settled that the freedom of speech and the free-

dom of the press protected by the First Amendment are included within the liberty protected by the Fourteenth Amendment. E.g., *Stromberg* v. *California*, 283 U. S. 359, 368; *Near* v. *Minnesota*, 283 U. S. 697, 707; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244; *De Jonge* v. *Oregon*, 299 U. S. 353; *Lovell* v. *Griffin*, 303 U. S. 444, 450; *Schneider* v. *State*, 308 U. S. 147; *Thornhill* v. *Alabama*, 310 U. S. 88; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Marsh* v. *Alabama*, 326 U. S. 501, 511-512, (dissent).[6]

The scope of the Fourteenth Amendment with respect to the specific guarantees of others of the first eight amendments is in doubt. In *Francis* v. *Resweber*, 329 U. S. 459, 462, the Court assumed, without deciding, that violation of the principles of the V and VIII Amendments as to double jeopardy and cruel and unusual punishment would be violative of the due process clause of the XIV Amendment. Whether the guaranty of the IV Amendment against unreasonable searches and seizures is to be considered as incorporated into the due process clause of the XIV Amendment awaits decision in *Wolf* v. *Colorado*, Nos. 17-18, this Term, argued October 19, 1948.

The field of regulatory legislation affords another suggestive example of the rejection of the purely historical approach in considering the scope of the XIV Amendment. In *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, this Court struck down the Kansas Industrial Court Act, insofar as it permitted the fixing of wages in a packing plant, as being in conflict with the XIV Amendment; significantly enough, the Court rejected the notion that because such regulation had been well known in Colonial days, it was to be

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[6] For a review of the development of this trend through the *Gitlow* case, see Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 Harv. L. Rev. 431.

deemed the measure of modern police power. Chief Justice Taft, speaking for a unanimous Court, said (262 U. S. 522, 537):

> "It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a Colonial legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

Of course the approach in regulatory cases is now substantially different, but here again it is significant that when *Nebbia* v. *New York*, 291 U. S. 502, reversed the earlier trend, it did not do so on the basis of historical precedents as to the scope of regulatory ordinances.

C. *The narrow confines of merely historical criteria should likewise be abandoned in interpreting the scope of the XIV Amendment's requirements as to representation by counsel.*

It is surely no novel suggestion to urge that the Due Process Clause of the XIV Amendment, insofar as it bears on the right to counsel, should be interpreted without meticulous regard to the historical boundaries within which that right, to the extent that it existed at all, was confined in the past, whatever be the appropriate datum point, whether 1789 or 1791 or 1868.

The first case in which this Court recognized that the denial of counsel could constitute a deprivation of the Due Process of Law guaranteed by the XIV Amendment involved a frank disavowal of precedents based solely on

history. *Powell* v. *Alabama*, 287 U. S. 45. As this Court there said (287 U. S. at 60):

> "If recognition of the right of a defendant charged with a felony to have the aid of counsel depended upon the existence of a similar right at common law as it existed in England when our Constitution was adopted, there would be great difficulty in maintaining it as necessary to due process."

Yet the Court held that, in the circumstances of that case, the denial of effective counsel to the petitioner there amounted to a deprivation of due process of law in violation of the XIV Amendment. If, then, it was proper to look beyond the precise historical contours of the common law as it stood in 1789, in order to determine that question in *Powell* v. *Alabama*, why is there now more sanctity in the concept of due process of law as it is shown by accepted historical research to have prevailed in 1868? And why should historical consistency in the interpretation of the XIV Amendment's guaranty of counsel be adhered to when, as he has been shown above, pp. 35-38, no such consistency has shackled this Court's interpretation of the VI Amendment's guaranty of a similar right? These are questions which, it is submitted, are not answered by anything to be found in *Betts* v. *Brady*, 316 U. S. 455, or in *Bute* v. *Illinois*, 333 U. S. 640.

It is not without significance that the rule of *Betts* v. *Brady*, 316 U. S. 455, is not an absolute. It too has been broadened or, if one prefers, whittled away in particular cases. E.g., *De Meerleer* v. *Michigan*, 329 U. S. 663; *Wade* v. *Mayo*, 334 U. S. 672; *Townsend* v. *Burke*, 334 U. S. 736; *Uveges* v. *Pennsylvania*, 335 U. S. 437. And the effect of those cases has been felt far beyond the personal fortunes of the petitioners therein concerned. Thus, the Supreme Court of Michigan, no doubt shamed by the unanimous *per curiam* reversal in *De Meerleer* v. *Michigan*, 329 U. S. 663,

adopted within the year the following rule, effective September 1, 1947 (Rule No. 35A; 318 Mich. xxxix-xl):

"Criminal Procedure—Arraignment and Sentencing

"In every prosecution wherein the accused is charged with a felony the trial court shall conform to the following practice:

"Sec. 1. Arraignment. If the accused is not represented by counsel upon arraignment, before he is required to plead the court shall advise the accused that he is entitled to a trial by jury and to have counsel, and that in case he is financially unable to provide counsel the court will, if accused so requests, appoint counsel for him. If the accused states he will procure counsel or requests that counsel be appointed, a reasonable time thereafter shall be allowed for counsel to consult with the accused before his plea shall be taken.

"Sec. 2. Imposing sentence. If the accused pleads guilty, after such plea and before sentence the court shall inform the accused of the nature of the accusation and the consequence of his plea; and regardless of whether he is represented by counsel, the court shall examine the accused, not necessarily under oath, and as a condition of accepting the plea of guilty and imposing sentence shall ascertain that the plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. Unless the court determines that the plea of guilty was so made, it shall not be accepted.

"Sec. 3. Record. The trial court shall cause a stenographic record to be made and promptly transcribed of the proceedings had under sections 1 and 2 above, and shall certify over his signature thereto that the same is a true record of the proceedings had. Thereupon the record so made shall be filed with the clerk of court and become and be kept as a part of the record in the case. In any subsequent proceedings such record

shall be competent evidence of the facts and circumstances therein recorded.

"This rule is mandatory but failure to comply therewith shall not be considered jurisdictional."

And, following this Court's decision at the Term next after the *De Meerleer* case, in *Marino* v. *Ragen*, 332 U. S. 561, the latter a case where the Attorney General of Illinois confessed error, the Supreme Court of Illinois adopted a similar rule requiring the appointment of counsel for all indigent defendants charged with felony. See Snively, *The Right of an Accused to the Assistance of Counsel*, 32 J. Am. Jud. Soc. 111, 113. That rule, effective September 1, 1948, provides:

"In all criminal cases wherein the accused upon conviction shall, or may, be punished by imprisonment in the penitentiary, if, at the time of his arraignment, the accused is not represented by counsel, the court shall, before receiving, entering, or allowing the change of any plea to an indictment, advise the accused he has a right to be defended by counsel. If he desires counsel, and states under oath he is unable to employ such counsel, the court shall appoint competent counsel to represent him. The court shall not permit waiver of counsel, or a plea of guilty, by any person accused of a crime for which upon conviction, the punishment may be imprisonment in the penitentiary, unless the court finds from proceedings had in open court that the accused understands the nature of the charge against him, and the consequences thereof if found guilty; and understands he has a right to counsel, and understandingly waives such right. The inquiries of the court, and the answers of the defendant to determine whether the accused understands his rights to be represented by counsel, and comprehends the nature of the crime with which he is charged, and the punishment thereof fixed by law, shall be recited in, and become part of the common law record in the case;

> provided, in no case shall a plea of guilty be received or accepted from a minor under the age of eighteen years, unless represented by counsel."

The standard of what constitutes due process of law with respect to the assignment of counsel in these two states has thus been changed from the standards which prevailed there earlier, just as the standard of what is involved in the right to have the assistance of counsel in the federal courts changed between 1791 and 1938. It is not without significance that the two rules of court just set out above are in substance identical with Rule 44, F. R. Crim. P.:

> "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

In other words, under the impetus of the decisions of this Court, the concept of due process has expanded, so that, in more and more jurisdictions, cf. *Betts* v. *Brady*, 316 U. S. 455, 474, 477-480, the standard of what "due process" demands so far as legal assistance at trials is concerned has become identical with what "the right * * * to have the Assistance of Counsel for his defence" requires in the same situation. The VI Amendment is no longer interpreted today as it was in 1868; why then should the XIV Amendment be so interpreted?

Our whole constitutional history repels the notion that Due Process of Law is something static, something which the historians can recreate today precisely as it existed in the past, much as the archeologist who exhumes fossilized leaves and animals can demonstrate exactly how life went on ages ago. Quite to the contrary, the interpretation of "liberty" and "due process of law" in the XIV Amendment has been a living, growing, vital process, one which

throughout this Court's recent history has exemplified Tennyson's immortal vision of a land

> "Where Freedom slowly broadens down,
> "From precedent to precedent."

This Court's treatment of the XIV Amendment has, for the most part, paid heed to Holmes' prophetic warning, uttered more than half a century ago, that learning, though a very good thing, "is liable to lead us astray." *Learning and Science*, in *Collected Legal Papers*, p. 138. And Mr. Justice Holmes continued (pp. 138-139):

> "The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity."

There is no more reason to cling to historic continuity in the interpretation of the XIV Amendment insofar as the right to counsel is concerned than there was to adhere to historic continuity in the interpretation of the same Amendment insofar as freedom of speech is concerned, or than there was to cling to historic continuity in the interpretation of the VI Amendment's "right * * * to have the Assistance of Counsel in his defence."

Today's meaning of the XIV Amendment as "a conception of fundamental justice", see *Foster* v. *Illinois*, 332 U. S. 134, 136, requires that no defendant accused of felony shall be forced to defend himself without the assistance of counsel against a prosecution conducted by a trained law-

yer, in any court of the land, state or federal (unless of course the assistance of counsel be first understandingly waived). The essential inequality of the contest otherwise, regardless of the tribunal wherein it takes place, is, necessarily, a denial of what the present age considers fundamental justice.

Conclusion

The judgment below should be reversed.

Respectfully submitted.

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